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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

JAMES A. SCHLESINGER, Secretary of Defense, and BERNARD B. LYNN, Director of Defense Contract Audit Agency, PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Secretary of Defense and the Director of the Defense Contract Audit Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

Neither the court of appeals nor the district court rendered any opinion.[1]

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[1] This petition for this writ of certiorari seeks review of the court of appeals' denial of a writ of prohibition and/or

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1975 (App. A, *infra*, 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Freedom of Information Act and Rule 53(b) of the Federal Rules of Civil Procedure preclude the district court from referring this Freedom of Information Act ("FOIA") case and all other complex FOIA cases to special masters for recommended decisions.

STATUTE AND RULE INVOLVED

Sections 2(b)(2) and (5) of the Freedom of Information Act of 1967, 81 Stat. 54, 5 U.S.C. 552 (b)(2) and (5), provide in pertinent part:

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mandamus in *Schlesinger* v. *United States District Court for the District of Columbia*, No. 75-1013 (C.A.D.C.) (App. A, *infra*, 1a). On January 21, 1975, the court of appeals granted petitioners' motion for a stay of the district court's January 7, 1975, order appointing a special master until February 21, 1975 (App. A, *infra*, 3a). On February 24, 1975, the court of appeals extended the stay until March 23, 1975 (App. A, *infra*, 4a).

Also included in App. A, *infra*, is the court of appeals' dismissal of petitioners' appeal in *Cuneo* v. *Schlesinger*, No. 75-1005 (C.A.D.C.) (App. A, *infra*, 2a), which raised the same substantive issues presented in the petition for a writ of mandamus.

(b) This section does not apply to matters that are—

* * * * *

(2) related solely to the internal personnel rules and practices of an agency;

* * * * *

(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.

Rule 53(b) of the Federal Rules of Civil Procedure provides:

(b) REFERENCE. A reference to a master shall be the exception and not the rule. In actions to be tried by a jury, a reference shall be made only when the issues are complicated; in actions to be tried without a jury, save in matters of account and of difficult computation of damages, a reference shall be made only upon a showing that some exceptional condition requires it.

STATEMENT

This petition for a writ of certiorari seeks review of the court of appeals' denial of a petition for a writ of prohibition and/or mandamus which sought to prevent the district court from referring this case to a special master. The prior proceedings which culminated in the district court's action and the court of appeals' denial of review are set forth below.

Plaintiffs' attorneys, whose practice consists substantially of advising and conducting litigation on behalf of firms that contract with the United States, brought suit under the Freedom of Information Act of 1967, 5 U.S.C. 552, *et seq.*, seeking access to the Defense Contract Audit Manual (the "Manual") compiled by the Defense Contract Audit Agency to assist its auditors in verifying costs incurred by private contractors in performing contracts for the armed services. The district court, after examining the Manual *in camera*, held the Manual exempt from disclosure under 5 U.S.C. 552(b)(2) and (5), and granted the government's motion for summary judgment. *Cuneo* v. *Laird*, 338 F. Supp. 504 (D.D.C.).

The district court found that "[a]udits [of government contracts] must be conducted on a selective basis" (338 F. Supp. at 505), and that the Manual could be compared to a "play-book" that cannot be released to the opposing team (*id.* at 506). The court concluded that disclosure of the Manual would enable defense contractors to avoid the selective auditing procedures contained in the Manual, thereby permitting cost claims "that might well result in bilking the Government, and hence the taxpayers, of hundreds of millions of dollars on Defense Contracts." *Cuneo* v. *Laird*, *supra*, 338 F. Supp. at 506.

The court of appeals reversed, holding that the record did not contain sufficient information to permit review of the Freedom of Information Act claims. *Cuneo* v. *Schlesinger*, 484 F.2d 1086 (C.A.D.C.). The case was remanded to the district court for further

proceedings with particular directions to determine whether the Manual constituted "secret law" (*id.* at 1089). The court of appeals ordered the government, on remand, to index the Manual, to correlate the portions of the Manual claimed to be exempt from disclosure with the appropriate sections of the Freedom of Information Act, and to set forth reasons justifying the withholding of the information.

The court of appeals commented in dictum that the district court, in its discretion, could "appoint a special master to examine the manual, the government's justification, and the indexing" (*Cuneo* v. *Schlesinger*, *supra*, 484 F.2d at 1092).[2]

On remand the government complied with the court of appeals' instructions by submitting a detailed page-by-page index, a statement relying on exemptions 2 and 5 of the Freedom of Information Act of 1967, 5 U.S.C. 552(b)(2) and (5), and affidavits of the immediate past and present Directors of the Defense Contract Audit Agency. The Manual was again made available to the district court for *in camera* inspection.

On November 20, 1974, the district court, over the government's objections, ordered the appointment of

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[2] The court of appeals made a similar comment in its opinion in *Vaughn* v. *Rosen*, 484 F.2d 820, 828 (C.A.D.C.). The government filed a joint petition for a writ of certiorari in both *Cuneo* v. *Schlesinger*, *supra*, and *Vaughn* v. *Rosen*, *supra*, which presented, *inter alia*, the question of the appointment of a special master. The petition for a writ of certiorari was denied. *Rosen* v. *Vaughn*, 415 U.S. 977. See note 6, *infra*.

a special master (App. B, *infra*, 5a). The court observed (App. C, *infra*, 10a) that Freedom of Information Act cases involve "complex matters before Judges that they have no competency whatever to decide," and further stated:

> If you are talking about setting precedent in future cases, I must say that this Court has been so overburdened with this Freedom of Information Act, that in the future in almost any complex case, I am going to appoint a special master, so it is going to be a precedent, that is for sure. [App. C, *infra*, 15a.]

On January 7, 1975, the court appointed Daniel M. Arons, Vice-Chairman of the Armed Services Board of Contract Appeals, as special master and directed him to review the entire Manual *in camera* and to make findings and conclusions concerning the applicability of exemptions claimed by the government (App. B, *infra*, 6a-8a).

Petitioners filed a motion for a writ of prohibition and/or mandamus and a notice of appeal from the district court's November 20, 1974 order, seeking to prevent the appointment of, and the reference to, a special master. The court of appeals without opinion denied the writ (App. A, *infra*, 1a) and dismissed the appeal (App. A, *infra*, 2a).[3]

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[3] The special master has not yet reviewed the Manual or proceeded with other duties as required by the January 7, 1975, order of the district court (App. B, *infra*, 6a-8a). The court of appeals granted petitioners' motion for a stay until February 21, 1975, of the district court's orders appointing a special master (App. A, *infra*, 3a). On February 24, 1975,

REASONS FOR GRANTING THE WRIT

This case presents an issue of general importance to judicial administration and of particular importance to Freedom of Information Act litigation. The district court's appointment of a special master in this case—and its stated intention to appoint special masters in all future complex Freedom of Information Act cases—is yet another illustration of an increasing tendency of federal district courts to refer categories of important cases to United States magistrates or special masters.[4]

The district court's action in this case, and its stated intention concerning future cases, is contrary to the express terms of Rule 53(b) of the Federal Rules of Civil Procedure as construed by this Court in *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249. The district court's action is also inconsistent with the policies of the Freedom of Information Act as interpreted by this Court's decision in *Environmental Protection Agency* v. *Mink*, 410 U.S. 73.

1. Rule 53(b) of the Federal Rules of Civil Procedure states that a reference to a special master "shall be the exception and not the rule", and shall

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the court of appeals extended the stay until March 23, 1975 (App. A, *infra*, 4a).

[4] See, *e.g.*, *Wingo* v. *Wedding*, No. 73-846, decided June 26, 1974 (reference of habeas corpus applications to magistrates); *Weber* v. *Secretary of Health, Education, and Welfare*, 503 F.2d 1049 (C.A. 9), petition for a writ of certiorari pending, No. 74-850 (reference of social security cases to magistrates). See also *TPO, Inc.* v. *McMillen*, 460 F.2d 348 (C.A. 7).

be made "only upon a showing that some exceptional condition requires it." This Court's decision in *LaBuy* v. *Howes Leather Co.*, *supra*, makes clear that neither docket congestion nor the complexity of litigation—the only grounds cited by the district court in this case—constitutes an exceptional condition that requires a reference to a special master.

Docket congestion is a particularly inappropriate ground for reference to a special master because it would, particularly in light of the volume of Freedom of Information Act cases filed in the District of Columbia,[5] make * * * references the rule rather than the exception" (*LaBuy*, *supra*, 352 U.S. at 259). Indeed, the district court has indicated that precisely that result will occur in Freedom of Information Act cases in the District of Columbia (App. C, *infra*, 5a).

Moreover, the district court's reliance on docket congestion as a justification for the reference in this case rests, we submit, on the erroneous premise that the litigation will be expedited by the reference. The district court has previously reviewed the Manual and now has before it a detailed index of the Manual prepared by the government. Reference will not expedite the decision in this case; rather, as this Court held in *LaBuy*, *supra*, 352 U.S. at 256, the district court can "dispose of the litigation with greater dispatch and less effort than anyone else."

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[5] More than half of all Freedom of Information Act cases handled by the Department of Justice are brought in the District of Columbia. See our reply memorandum in *Butterfield* v. *Robertson*, No. 74-450, p. 3 n. 2.

The complexity of legal issues presented does not warrant reference to a special master; indeed, the presence of complex questions of law is "an impelling reason for trial before a regular, experienced trial judge rather than before a temporary substitute appointed on an *ad hoc* basis and ordinarily not experienced in judicial work" (*LaBuy, supra*, 352 U.S. at 259). The ultimate issue in this case—unlike essentially factual questions such as those involved in an accounting for damages which might be appropriate for reference to a special master (*ibid.*)—is whether the Manual constitutes "secret law". That issue is particularly appropriate for resolution by a district judge.[6]

2. The reference in this case, and the district court's intention to refer all future Freedom of Information Act cases to special masters, may involve substantial intrusions on interests protected by the Freedom of Information Act. If, as we contend and as the district court originally held, the Manual is exempt from disclosure under Exemption 5 of the Act (5 U.S.C. 552(b)(5)), release of the Manual "would be 'injurious to the consultative functions of government * * *.'" *Environmental Protection*

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[6] At the time of filing of the petition denied in *Rosen* v. *Vaughn* (note 2, *supra*), a special master had not been appointed in either *Cuneo* or *Rosen*. A special master has now been appointed in this case, and but for the court of appeals' stays, would be exercising judicial functions. The issue of reference to a special master is therefore ripe for consideration.

Agency v. *Mink*, *supra*, 410 U.S. at 87. In light of the governmental interest against disclosure, even *in camera* inspections by district courts should not be made routinely or automatically (*id.* at 93). Yet the district court has indicated that inspections by special masters will be "automatic".

To be sure, the degree of invasion of the government's interest in maintaining the confidentiality of material may depend on the identity of the individual appointed as special master. In the district court, respondents asserted that the special master appointed here is entitled to access to the Manual in his capacity as a member of the Armed Services Board of Contract Appeals. The record does not contain any information concerning this point,[7] and, in our view, the question of the special master's right of access to the Manual is inextricably related to the merits of this litigation.

Throughout this litigation we have contended that the Manual does not constitute "secret law"; that it is an intra-agency memorandum not to be cited by government counsel, and, of course, not to be used as a basis for decisions, in government contract litigation. If, as we believe, our submission is correct, the Board of Contract Appeals would not be entitled to access to the Manual, and indeed, if it were furnished to the Board but not to a private litigant, substantial due process issues would arise.[8]

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[7] We are informed by the Defense Contract Audit Agency that Mr. Arons has not in fact seen the Manual.

[8] Moreover, if the district court ultimately upholds our position that the Manual does not constitute "secret law", dis-

Apart from this case, the district court's stated intention to refer all future complex Freedom of Information Act cases to a special master presents substantial questions. Special masters are frequently appointed from the practicing bar and such persons, although they may not be subject to conflicts of interest at the time of their appointment, may thereafter acquire obligations inconsistent with their service as a special master. Even if, as in this case, a special master is appointed from a government agency, such persons may be subjected to conflicting pressures that cast doubt on the objectivity of their recommendations.

3. The court of appeals erred in refusing to issue a writ of mandamus and/or prohibition to prevent the reference in this case. The reference was "so palpably improper so as to place it beyond the scope of the rule invoked" (*LaBuy, supra*, 352 U.S. at 256) and mandamus should have issued. See also *Los Angeles Brush Corp.* v. *James*, 272 U.S. 701; *McCullough* v. *Cosgrave*, 309 U.S. 634.

Mandamus was particularly appropriate because the reference presented an issue of first impression and review is necessary to settle "new and important problems" in the administration of the Freedom of Information Act. *Schlagenhauf* v. *Holder*, 379 U.S. 104, 111. An appeal after a final decision on the merits will not protect the Freedom of Informa-

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closure to Mr. Arons may operate to disqualify him from participating in Board appeals involving audit questions.

tion Act interests at stake and the Rule 53 issue will be moot if review is postponed.[9]

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari be granted.

ROBERT H. BORK,
Solicitor General.

CARLA A. HILLS,
Assistant Attorney General.

WILLIAM L. PATTON,
Assistant to the Solicitor General.

LEONARD SCHAITMAN,
LARRY R. O'NEAL,
Attorneys.

MARCH 1975.

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[9] *LaBuy* involved a pattern of references to special masters. While such a pattern has not yet emerged in the District of Columbia, the court of appeals has endorsed, albeit in dictum, the use of special masters in Freedom of Information Act cases (see, *e.g.*, *Cuneo* v. *Schlesinger*, *supra*, 484 F.2d at 1092, and *Vaughn* v. *Rosen*, *supra*, 489 F.2d at 828), and the district court has stated that it intends to refer all complex Freedom of Information Act cases to special masters (App. C, *infra*, 15a). Unless it is resolved in this case, references to special masters will be a recurring issue in Freedom of Information Act litigation, and the interests of judicial economy require that it be resolved now.

APPENDIX A

Page	Document
1a	In *Schlesinger* v. *United States District Court for the District of Columbia,* CADC's denial of the writ of prohibition and/or mandamus and denial of immediate temporary stay pending CADC's action on the writ. Order of January 6, 1975.
2a	In *Cuneo* v. *Schlesinger,* No. 75-1005 (C.A.D.C.), CADC's dismissal of our appeal in this action. Order of January 10, 1975.
3a	In *Schlesinger* v. *United States District Court for the District of Columbia,* No. 75-1013, CADC's granting of a stay pending application for certiorari—until February 21, 1975—order of January 21, 1975.
4a	In *Schlesinger* v. *United States District Court for the District of Columbia,* No. 75-1013, CADC's extension of stay pending application for certiorari until March 23, 1975—order of February 24, 1975.

APPENDIX B

5a	United States District Court for the District of Columbia, order of November 20, 1974 in *Cuneo* v. *Schlesinger* stating that a special master will be appointed.
6a-8a	United States District Court for the District of Columbia, order of January 9, 1974, appointing a special master with specific instructions.

APPENDIX C

9a	In *Cuneo* v. *Schlesinger,* first page of hearing of November 14, 1974, before Judge Hart.
10a-13a	Portions of the November 14, 1974 hearing before Judge Hart.
14a	In *Cuneo* v. *Schlesinger,* first page of hearing of December 5, 1974, before Judge Hart.
15a-17a	Portions of the December 5, 1974, hearing before Judge Hart.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

Civil 1826-67

No. 75-1013

[Filed Jan. 6, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

JAMES A. SCHLESINGER, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, RESPONDENT

Before: TAMM and ROBB, *Circuit Judges*

ORDER

On consideration of the Petition for a Writ of Prohibition and/or Mandamus and of Petitioners' Motion for Immediate Temporary Stay pending this Court's action on the Petition for a Writ of Prohibition and/or Mandamus, it is

ORDERED by the Court that petitioners' motion for immediate temporary stay is denied, and, it is

FURTHER ORDERED by the Court that petitioners' petition for Writ of Prohibition and/or Mandamus is denied.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

Civil 1826-67

No. 75-1005

GILBERT A. CUNEO, ET AL.

v.

JAMES A. SCHLESINGER, Secretary of Defense, ET AL.,
APPELLANTS

Before: TAMM and ROBB, *Circuit Judges*

ORDER

On consideration of appellees' motion to dismiss, it is

ORDERED by the Court that the aforesaid motion is granted and this appeal is dismissed.

The Clerk is directed to issue and transmit the mandate of this Court to the Clerk of the District Court forthwith.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

No. 75-1013

JAMES A. SCHLESINGER, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, RESPONDENT

Before: ROBB, *Circuit Judge*

ORDER

Petitioners have moved for a writ pursuant to 28 U.S.C. § 1651 pending application for a writ of certiorari in the Supreme Court of the United States. It appearing to this Court that the relief sought in the petition for certiorari may be rendered moot if the Defense Contract Audit Manual is disclosed to the Special Master, it is

ORDERED by the Court that the District Court's order directing disclosure in *Cuneo* v. *Schlesinger*, No. 1826-67 (D.D.C. 1974) is stayed until February 21, 1975.

The Clerk is directed to transmit a certified copy of this order to the Clerk of the District Court forthwith.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1974

1826-67

No. 75-1013

[Filed Feb. 24, 1975, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

JAMES A. SCHLESINGER, ET AL., PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, RESPONDENT

Before: ROBB, *Circuit Judge*

ORDER

On consideration of petitioners' motion to extend this Court's stay of January 21, 1975, it is

ORDERED that the aforesaid motion is granted and the District Court's order directing disclosure in *Cuneo* v. *Schlesinger*, No. 1826-67 (D.D.C. 1974) is stayed to and including March 23, 1975.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1826-67

GILBERT A. CUNEO, ET AL., PLAINTIFFS

v.

JAMES A. SCHLESINGER, ET AL., DEFENDANTS

ORDER

Upon consideration of the plaintiffs' Motion for the Appointment of a Special Master and the defendants' opposition thereto, and it appearing to the Court that the appointment of a Special Master in this case has been expressly authorized by the Court of Appeals, and that a Special Master will expedite final decision in this case, it is, therefore, by the Court this 20th day of November, 1974, ORDERED as follows:

(1) A Special Master will be appointed with instructions to review the entire case and report to the Court recommended findings and conclusions; and

(2) Counsel for plaintiffs and defendants may submit a nominee to act as Special Master, or if counsel cannot agree, they may each submit two names to the Court for the Court's consideration.

/s/ George L. Hart
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1826-67

GILBERT A. CUNEO, ET AL., PLAINTIFFS

v.

JAMES A. SCHLESINGER, ET AL., DEFENDANTS

ORDER

Upon consideration of plaintiffs' Motion for the Appointment of a Special Master, and it appearing to the Court that the appointment of a Special Master in this case has been expressly authorized by the Court of Appeals, and that a Special Master will expedite final decision in this case, it is, therefor, by the Court this 7th day of January, 1975, ORDERED as follows:

(1) Daniel M. Arons, Vice-Chairman of the Armed Services Board of Contract Appeals is appointed as the Special Master in this case;

(2) The Special Master shall review the record before this Court and the Court of Appeals;

(3) The Special Master shall review all of the portions of the Defense Contract Audit Manual and all amendments thereto, access to which has been refused by the defendant, *in camera*, and shall make with respect thereto findings and conclusions on the following subjects:

a. Those portions of the Manual which contain explanations, interpretations, refinements and instructions which amplify, implement, vary from or are significantly related to provisions of the Armed Services Procurement Regulation, including section 15 thereof and specifically relating furthermore to the allowance or disallowance of costs under government contracts and to the approval or disapproval of accounting systems and practices of government contractors;

b. The extent to which those portions of the Manual reviewed *in camera* are substantially similar in the directions and instructions for auditing and approval or disapproval of audited material to the Internal Revenue Audit Manual, which is before this Court and which was required to be disclosed by the Sixth Circuit Court of Appeals in *A. Kenneth Hawkes* v. *Internal Revenue Service*, 467 F.2d 787 (6th Cir. 1972);

c. Those portions of the Manual reviewed *in camera* which relate solely to internal personnel rules and practices of the Defense Contract Audit Agency;

d. Those portions of the Manual reviewed *in camera* which for any reason affect members of the public;

e. Those portions of the Manual reviewed *in camera* which have been ordered disclosed in any litigation (including administrative litigation) with the defendants;

(4) The Special Master shall conduct all proceedings which are necessary to determine the nature and

extent of disclosures by the defendant outside the federal government of those portions of the Manual, access to which has been refused to plaintiffs; and, the Special Master shall determine the extent to which such portions of the Manual have been published either verbatim or by substantial disclosure of their subject matter.

With respect to the proceedings so conducted, the Special Master shall make all necessary findings and recommended conclusions;

(5) The Special Master shall file with this Court his findings and conclusions no later than March 31, 1975;

(6) All costs incurred in connection with the functions of the Special Master shall be borne by plaintiffs;

(7) The Clerk of this Court is directed to promptly forward the entire file in this case to the Special Master.

/s/ George L. Hart
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Order was hand delivered to Jeffrey Axelrad, Esquire, Department of Justice, Washington, D. C. 20530, this 20th day of December, 1974.

/s/ Robert L. Ackerly
ROBERT L. ACKERLY

APPENDIX C

[1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1826-67

GILBERT A. CUNEO, ET AL., PLAINTIFF

vs.

JAMES A. SCHLESINGER, ET AL., DEFENDANT

Washington, D. C.
Thursday, November 14, 1974

The above-styled cause came on for hearing before THE HONORABLE GEORGE L. HART, JR., Chief Judge, United States District Court, in chambers, at 10:05 o'clock a.m. for status call.

APPEARANCES:

On behalf of the Plaintiff:

ROBERT L. ACKERLY, Esq.

On behalf of the Government:

JEFFREY AXELRAD, Esq.
Department of Justice.

* * * * *

E. ALFRED KAUFMAN
Official Reporter

* * * *

[6] secret law should be disclosed, we agree wholeheartedly with that concept.

We do not think that any portion of the Manual is secret law, and we think that we presented evidence to the Court, in keeping with the Court of Appeals ruling, and since then a detailed index, a further statement of pertinent facts with which plaintiffs have not differed on the question of how the contract dispute procedure operates, and we think that this shows that there is no secret law in the Manual.

Now, Your Honor had the opportunity of examining the Manual once and, of course, if Your Honor ordered, we would provide it again. We would vigorously oppose a Special Master for reasons different from those which Mr. Ackerly has expressed.

THE COURT: Why would you oppose it?

MR. AXELRAD: We oppose it, Your Honor, because we believe it is the function of a District Judge, if anyone, to examine the document which the Government claims should not be released, and that only an Article III Judge is the appropriate person to decide any such question.

THE COURT: Look, in the Freedom of Information law there is complex matters before Judges that they have no competency whatever to decide.

The Amchitka case involved all sorts of atomic secret information, and what not, that to me was just a lot of [7] Greek.

The same thing, I think, is true to a lesser extent in this type of case. You are talking about accounting practices, and that type of thing, which I do not

know anything on earth about, I do not know anything about.

The Court of Appeals has suggested that in that type of case we can get an expert in, and I think it would fair to all parties to get an expert in. If you all cannot get together on it—

MR. ACKERLY: I would be willing to pay for it, but may I make one minor point. I don't want to take up too much of the Court's time.

THE COURT: I have all day.

MR. ACKERLY: There are other Government lawyers besides the Department of Justice. These people represent the Navy, the Army, the Air Force. They use the Manual against us in these cases all the time.

I put in the record for Your Honor an opinion which is published where the Government lawyer argued on an allowance of a cost—argued for disallowance of the cost based on the Manual. He quoted the Manual. The Board Member quoted that section of the Manual in his opinion, and said in his opinion it wasn't applicable.

We are getting the Manual—and I have given Your Honor some cases—we are getting the Manual from the Armed

* * * *

[12] knowledge of both, and I think also we should have a lawyer who doesn't practice—

MR. ACKERLY: In the Government contract field—I agree.

THE COURT: So this would give him an undue advantage.

MR. ACKERLY: I agree.

MR. AXELRAD: Your Honor, the opposition aside, it might be possible for us to agree on an individual satisfying the criteria Your Honor has specified, but we would urge that the position which Mr. Ackerly has suggested be filed, be filed so that we may have a formal chance to oppose it, and perhaps at that stage would request Your Honor to certify that for an interlocutory appeal, because we feel very strongly about that.

THE COURT: The first part I will do; the second part I won't, because I think the Court of Appeals already decided. And I have discussed this matter several times with Judge Wilkey and members of the Court of Appeals—not in this case, but other cases. This is a perpetual problem; it is a perpetual problem.

And I go back to Amchitka. In Amchitka I had to call back experts and sit at that table and read paper upon paper and then ask question after question what the devil does this mean, what does that mean?

I have never in my life practiced administrative [13] law. It is as much of a puzzle to me as atomic energy, and I frankly don't feel qualified to determine what is secret law and what isn't, I just simply don't.

MR. AXELRAD: Well, Your Honor, with all due respect, I think that you are qualified.

THE COURT: There are judges who think they are God and know everything, but I am not one of them.

MR. AXELRAD: Your Honor, there is a Supreme Court decision, La Bue [*sic*] versus Howe Leather Company, involving an anti-trust proceeding which the Court assigned to a Special Master because of the complexity of the issues in what was a complex anti-trust case.

The Supreme Court in that case, as I recall, held that there was such error, such clear error in the appointment of the Special Master that it required mandamus, as I recall, to require the District Judge in that case to hear it. I am not suggesting that would be followed here.

THE COURT: Well, I am always amenable to mandamus from the Supreme Court.

MR. AXELRAD: I say that only as a recital of the facts in that case. But, Your Honor, here we have a Manual which while fairly voluminous, is not a huge bundle of thousands of documents.

THE COURT: It is either three or four volumes, so think [indicating], as I remember it, or is it more?

[1]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1826-67

GILBERT A. CUNEO, ET AL., PLAINTIFF

vs.

JAMES A. SCHLESINGER, ET AL., DEFENDANT

Washington, D. C.
Thursday, December 5, 1974

The above-styled cause came on for further hearing before THE HONORABLE GEORGE L. HART, JR., Chief Judge, United States District Court, at 10:00 o'clock a.m.

APPEARANCES:

On behalf of the Plaintiff:

ROBERT L. ACKERLY, Esq.

On behalf of the Government:

JEFFREY AXELRAD, Attorney
Department of Justice.

* * * * *

E. ALFRED KAUFMAN
Official Reporter

* * * *

[7] and understandable basis for decision, because we believe we have shown as a per se matter that nothing in the Manual can constitute secret law for

the simple reason that the final decision is made by a contracting officer on the basis of other matters which we have brought before the Court.

Now, I can't very well argue our whole case on this matter this morning, and won't attempt to. Plaintiff's counsel has contended our arguments are not legally sufficient, but certainly if you were to decide whether our showing in the papers which we have filed pursuant to Your Honor's scheduled proceedings are sufficient to entitle us to judgment, that might well dispose of the case. We think it would, without examining paragraph by paragraph the matter, especially since we have filed a page by page index.

THE COURT: You know what astounds me in this matter? I would think that the opposite positions would have been taken here. I would have thought that you all would have welcomed an expert in the field, and the plaintiff might have opposed it. And I have a very difficult time understanding why you oppose an expert in the field, it seems to me so highly desirable.

MR. AXELRAD: It is the principle of the matter, Your Honor.

THE COURT: If you are talking about setting precedent [8] in future cases, I may say that this Court has been so overburdened with this Freedom of Information Act, that in the future in almost any complex case, I am going to appoint a special master, so it is going to be a precedent, that is for sure.

MR. AXELRAD: Well, Your Honor, we are concerned about that. It is not just in Information Act cases, although that is our prime concern, we have specific concerns in that matter, and I am distressed to hear—although I appreciate Your Honor's candor —I am distressed to hear Your Honor is contemplating that course.

For one thing, Your Honor, we do not think that the question of what constitutes secret law requires the type of expertise, we think it's the type of question which judges traditionally handle.

THE COURT: We traditionally handle a lot of things we don't know anything about.

MR. AXELRAD: We think that is the function of judges. It's a neutral concept for which we are contending, we are simply contending that judges are responsible under the Constitution to—

THE COURT: No question about it, the final responsibility is mine, but I also have a responsibility to get help if I need it.

MR. AXELRAD: Your Honor, the question is, where lies

* * * *

[17] certify it, and I think you would be wasting your time.

MR. AXELRAD: Should we seek appellate relief, could Your Honor stay the proceedings before the special master while appellate proceedings are pending?

THE COURT: No, because this is a '67 case, and I would like very much to get rid of the thing. So there we are.

[Hearing concluded.]

* * * *

CERTIFICATE OF REPORTER

I hereby certify that the foregoing 17 pages constitute the official transcript of proceedings had in the above-styled cause.

/s/ E. A. Kaufman
Official Reporter

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Supreme Court, U.S.
FILED
APR 16 1
MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1142

JAMES A. SCHLESINGER, Secretary of Defense, and BERNARD B. LYNN, Director of Defense Contract Audit Agency,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Respondent,

and

GILBERT A. CUNEO,

Respondent-Intervenor.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT AND RESPONDENT-INTERVENOR IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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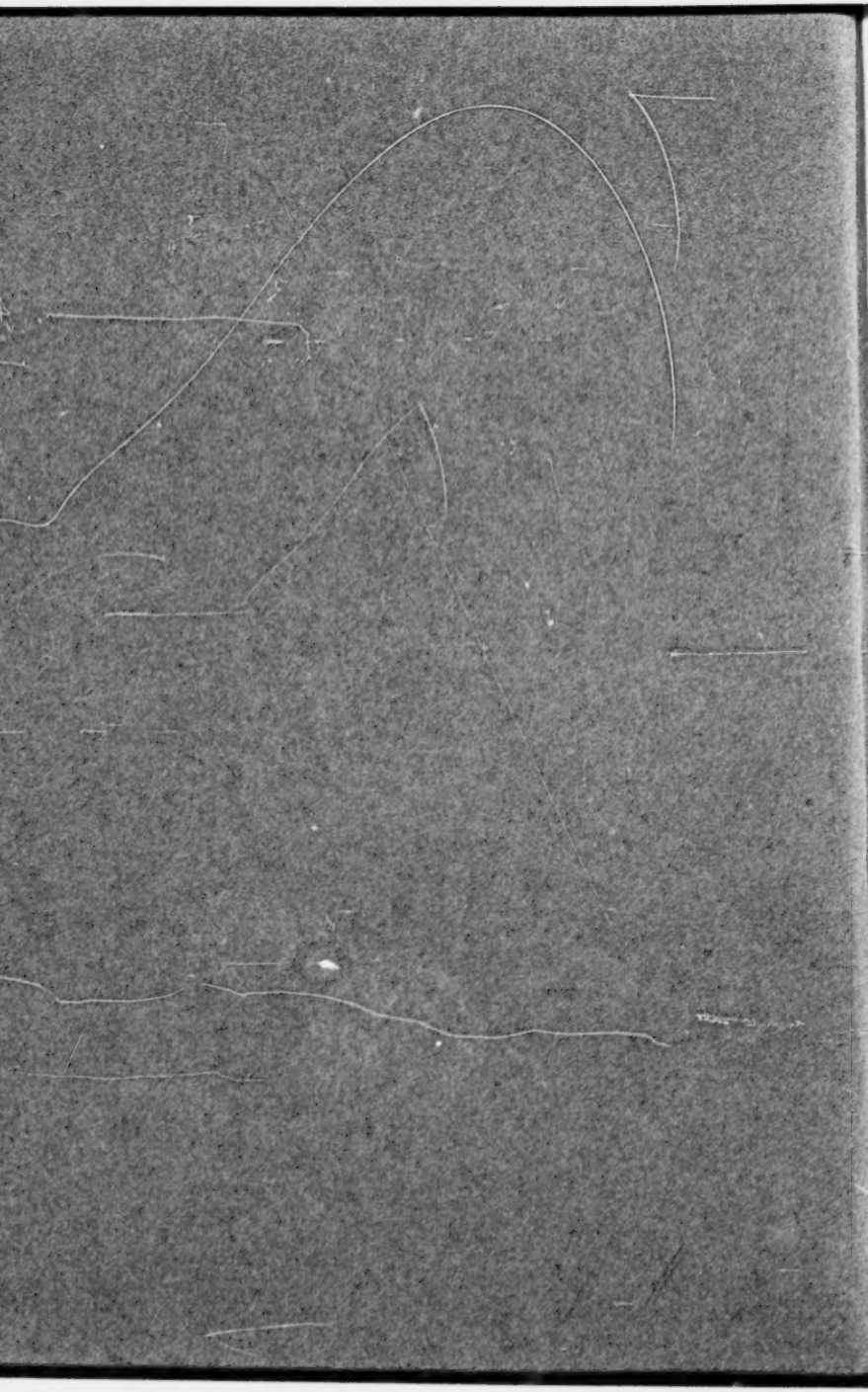

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1142

JAMES A. SCHLESINGER, Secretary of Defense, and BERNARD B. LYNN, Director of Defense Contract Audit Agency,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Respondent,

and

GILBERT A. CUNEO,

Respondent-Intervenor.

On Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF FOR RESPONDENT AND RESPONDENT-INTERVENOR IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether under Rule 53(b) of the Federal Rules of Civil Procedure the District Court properly ordered the appointment of a special master to make recom-

mended findings on the Defense Contract Audit Agency Manual, the release of which is sought under the Freedom of Information Act.

STATEMENT OF THE CASE

This action was among the first filed under the Freedom of Information Act (hereinafter "FOIA"), 5 U.S.C. § 552 (1970), *as amended,* Pub. L. No. 93-502, 88 Stat. 1561 (1974). The action was filed one day after the FOIA became effective, July 7, 1967. The complaint requested access to the Defense Contract Audit Manual. Perhaps no case under FOIA has been as vigorously contested as the instant one and this is petitioners' second attempt to have the case reviewed by this Court. *Cuneo* v. *Schlesinger, cert. denied, Rosen* v. *Vaughn,* 415 U.S. 977 (1974).

In its original decision the District Court concluded that the Manual was exempt from disclosure under 5 U.S.C. § 552(b)(2) and (5). *Cuneo* v. *Laird,* 338 F. Supp. 504 (D.D.C. 1972). The Court of Appeals reversed, noting that the District Court's findings of fact were not detailed enough for a determination as to whether or not any part of the Manual (consisting of three volumes and hundreds of pages) contained material not within the exemptions. The Court held further that to the extent the Manual refined and applied the cost principles of the Armed Services Procurement Regulations, the Manual contained "secret law" which must be disclosed to the public. *Cuneo* v. *Schlesinger,* 484 F.2d 1086 (D.C. Cir. 1973). The Court of Appeals did not then reach other issues which are pending in the case, such as waiver and prior publication.

On remand, the burden on the District Court required its determination as to whether the Manual

contained accounting principles and practices and refinements of the cost principles in the Armed Services Procurement Regulations. The Court of Appeals suggested in this regard that the District Court might appoint a special master to examine the Manual, the government's justification for nondisclosure, and the index of the Manual's contents which the government was required to prepare. *Cuneo* v. *Schlesinger, supra,* 484 F.2d at 1092.

The District Court considered the record on remand, which record included the following salient features not discussed in the Petition for a Writ of Certiorari:

1. The petitioners have distributed at least 2,244 copies of the Manual in addition to those distributed within the Defense Contract Audit Agency. (App. A). Distributees entirely outside the Department of Defense totaled at least 901 persons or instrumentalities. (App. A). Included among the many admitted authorized distributees entirely outside the government are the Italian Embassy, the German Military Representative to the United States, the British Embassy and the Canadian Embassy, as well as a number of officials of state and local governments. (App. A).

2. Contrary to the petitioners' statement in the Petition for a Writ of Certiorari, government agencies appearing before the Armed Services Board of Contract Appeals (hereinafter ASBCA), of which the appointed special master is Vice Chairman, have attempted to rely upon the provisions of the Manual to argue for the disallowance of costs incurred during the performance of government contracts. *The Boeing Company,* ASBCA No. 14370, 73-2 BCA ¶ 10,325 (1973); *LTV Aerospace Corp.,* ASBCA

No. 17130 (Unpublished Order dated February 12, 1974) (App. B).

3. The ASBCA has on several occasions ordered the production for *in camera* inspection of portions of the Manual and, after review, required disclosure of at least portions of the Manual.

4. Portions of the Manual have been published and offered for sale for profit by private publishers. (App. C.)

5. A copy of the Manual was provided by petitioners to the ASBCA and was kept by the ASBCA in its library, which is open to segments of the public. This copy was removed from the ASBCA library by petitioners' agents when its presence there was disclosed by the respondent-intervenor in this case. (App. D.)

6. Employees of the Defense Contract Audit Agency are authorized and instructed to disallow costs incurred by contractors based upon the cost principles described in the Manual and such a disallowance is final unless the contractor takes an appeal. (App. E).

After the remand to the District Court, and in accordance with the orders of the Court of Appeals and District Court, petitioners did make a submission to the Court purporting to represent the detailed indexing and analysis required by the Court of Appeals. However, what petitioners in fact submitted to the District Court was merely a copy of the Table of Contents of the Defense Contract Audit Manual which was, by itself, not at all illuminating. Furthermore, petitioners failed absolutely to comply with the other instructions of the Court of Appeals and the District Court which required them to segregate the Manual into manageable segments and provide as to each such segment the

reasons why nondisclosure was authorized by the FOIA All that petitioners did was to resubmit their general defenses to disclosure of the whole Manual, which defenses had been clearly rejected by the Court of Appeals.

Thus, on remand the District Court was faced with the prospect of evaluating hundreds of pages of the Manual containing detailed statements of accounting principles and practices, accounting cost liability criteria, and statements of business and financial practices. This analysis the Court would have had to conduct without any benefit of guidance by plaintiff (respondent-intervenor herein).

Being fully cognizant of this problem, the District Court appropriately directed the appointment of a special master to review the cost principles of the Armed Services Procurement Regulations and the Defense Contract Audit Manual to determine the extent to which the Manual refines and particularizes the general cost principles in the regulations. The Court's reference to a special master appears to be entirely consistent with Rule 53(b) of the Federal Rules of Civil Procedure.

To assure that there are no unauthorized releases of the Manual pending the report of the special master, the Court appointed to serve as master the Vice Chairman of the Armed Services Board of Contract Appeals, Honorable Daniel M. Arons. Judge Arons is an employee of the Department of Defense and is called upon regularly in the course of his official duties to decide contested issues as to allowable costs and the application of cost principles. The cases presented before the Armed Services Board of Contract Appeals

involve disputes arising out of the award, performance, and termination of government contracts. Judge Arons therefore appears not only to be especially qualified in this rather complex field, but has had a copy of the Manual available to him in the Board's library. Moreover, the Board on which he sits has been presented continually with arguments by counsel for government agencies that the Manual controls the disallowance of certain costs incurred by government contractors.

SPECIAL SUBJECT OF THIS PETITION

As the Petition makes clear, it is petitioners' objective to obtain from this Court a decision which would bar Federal District Courts from appointing special masters to conduct *in camera* inspections of documents in complex FOIA cases. *This* object at least is stated directly in petitioners' recitation of the question presented. Though *unstated,* it is equally clear that petitioners' more basic objective is to curtail and limit the operation of the FOIA by imposing on district courts the possibly unmanageable obligation to review without assistance thousands of pages of technically complex documents generated by, or in the possession of, the Federal Government.

Thus, this case is being used by petitioners before this Court as a device to gain a limitation on their disclosure obligations under the FOIA, which result, although not provided by statute, would be far more effective than any of the express exceptions which the Act does contain. Petitioners say virtually nothing about special circumstances in *this* case which would suggest that the appointment of a special master is an abuse of the District Court's discretion under Rule 53,

Federal Rules of Civil Procedure. What is sought then is this Court's imprimatur on a rule of law which would prohibit the utilization of special masters to conduct *in camera* inspection of documents in any FOIA case.

ARGUMENT

1. Though the Freedom of Information Act as originally passed was silent on the subject of *in camera* inspection of documents by the district courts, a substantial body of precedent for such inspections was created. *See, e.g., Environmental Protection Agency* v. *Mink,* 410 U.S. 73, 88 n.15 (1972). In the 1974 amendments to the Freedom of Information Act (Pub. L. No. 93-502; 88 Stat. 1561, effective February 19, 1975), Congress codified the *in camera* inspection procedure by expressly incorporating it into the district court procedures for *de novo* review of agency refusals to produce documents. 5 U.S.C. § 552(a)(4)(B). It is clear that the intent of Congress was to broaden very substantially the instances in which the Federal District Courts could and should examine documents *de novo.* In *Mink,* this Court's discussion of the *in camera* inspection issues which are raised by *Kaiser Aluminum & Chemical Corp.* v. *United States,* 141 Ct. Cl. 38, 157 F. Supp. 939 (1958), is rendered moot by the 1974 amendments to the FOIA. *Environmental Protection Agency* v. *Mink, supra,* 410 U.S. at 92, 93. In fact, it seems quite clear that it was the intent of Congress both to broaden disclosure and enlarge the functions of district courts in effecting disclosure in the light of this Court's interpretation of the FOIA in the *Mink* case.

It is not unreasonable to presume, after the 1974 amendments to the Freedom of Information Act, that district courts will be called upon more and more frequently to review documents *in camera*. It is equally clear that many of these cases will involve documents which are so numerous or technically complex that to limit exposure of the documents solely to the facilities of the courts without any assistance from special masters where appropriate would impose upon district courts an impossible burden. It is unlikely that Congress intended such a limitation in expressly providing for *in camera* inspection in the 1974 amendments to the FOIA.

As petitioners note, the appointment of a special master by Chief Judge Hart in the District Court had been suggested expressly by the Court of Appeals in remanding the case. *Cuneo* v. *Schlesinger, supra,* 484 F.2d at 1092. In his concurring opinion in the Court of Appeals, Chief Judge Bazelon pointed out the problems that the courts have encountered in applying the Freedom of Information Act and suggested that the principles for review of records *in camera* are, like much in the law, an experiment to be tried by experience. 484 F.2d at 1093. In a parallel FOIA case, *Vaughn* v. *Rosen,* 484 F.2d 820 (D.C. Cir. 1973), the same Court of Appeals suggested appointing a special master and also set forth detailed criteria for review of records by district courts, presumably to include the special masters they might appoint. This Court has previously denied certiorari in both the *Cuneo* and *Vaughn* cases. *Cuneo* v. *Schlesinger, cert. denied, Rosen* v. *Vaughn, supra.*

This Court should not grant certiorari in the instant case. Certiorari should be denied, permitting the re-

view of documents by the special master to proceed. Here the special master is a person who has already had access to the subject of the FOIA request, the Defense Contract Audit Manual, and is an employee of the Department of Defense. He unquestionably has authority to view and have access to the Manual. In his position as Vice Chairman of the Armed Services Board of Contract Appeals, the special master has supervisory authority over the judges of the Board, and the Board has already passed upon portions of the Defense Contract Audit Manual. Thus, petitioners would, by the appointment of this special master, incur no additional exposure of the document for which protection is sought.

The appointment of a special master in this case seems particularly appropriate in light of Rule 53(b) of the Federal Rules of Civil Procedure, which authorizes reference to a master in matters of account. Rule 53 contemplates explicitly that a "master" may be a referee, auditor, examiner, commissioner, or assessor. True, the function of the master here is not to render a specific accounting on a claim; yet his findings and conclusions will be based upon an application of accounting principles with a view to their specialized application in the Armed Services Procurement Regulations and the Defense Contract Audit Manual.

The petitioners' rather tortured attempt to discount the accounting features of the reference to a master simply ignores the nature of the Manual, its function, its use by government auditors and government attorneys, and the dignity placed by government officials on the principles in the Manual in disallowing costs under a government contract.

2. The petitioners rely almost entirely upon *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249 (1957). The issue there presented was simply whether a trial judge who preferred to avoid a complicated six-week antitrust trial was justified in referring the trial to a special master. The petitioners' expansive interpretation of that case would preclude the appointment of a special master in any case except perhaps one involving only reconciling books of account. *But see Civil Aeronautics Board* v. *Carefree Travel*, 43 U.S.L.W. 2396 (2d Cir., Mar. 7, 1975).

The convoluted reasoning of the petition is best demonstrated by note 8 at page 10, which reads in its entirety:

> Moreover, if the district court ultimately upholds our position that the Manual does not constitute "secret law," disclosure to Mr. Arons may operate to disqualify him from participating in Board appeals involving audit questions.

The lack of logic here is apparent. If the Manual does not contain secret law, it would have no application to audit questions. If the Manual applies to audit questions, it does indeed constitute secret law and should be disclosed.

The use of a special master as an aid in the preliminary stages of complex litigation has an accepted place in federal practice. In *Collins And Aikman Corporation* v. *J. P. Stevens & Co., Inc.*, 51 F.R.D. 219 (D.S.C. 1971), the district court appointed a special master to hear arguments of counsel on claims of privilege related to documents for which each party sought production. The special master was directed to undertake an *in camera* inspection of documents with respect to

which each party indicated a claim of privilege. The parties were advised by the court that to the extent questions of privilege would need resolution in order to complete discovery, the court would appoint a special master pursuant to Rule 53. The function of the master in *Collins And Aikman* was similar to the function of the master in the instant case. The reference here would in no way deprive petitioners of the decision of a district court. Rather, it would permit the court to act on a fully developed record, including the recommended findings of an Administrative Law Judge with special expertise in the application of complex accounting principles.

3. The Court of Appeals not only refused to issue the requested Writ of Mandamus and/or Prohibition, but denied petitioners' appeal from the Order of the District Court specifically appointing the master. *Cuneo* v. *Schlesinger,* No. 75-1005 (D.C. Cir.) (App. A to Petition for Certiorari, p. 2a). The original opinion of the Court of Appeals reflects its careful consideration of this case before reversing the initial District Court order. *Cuneo* v. *Schlesinger, supra.* The phrase "secret law" used by the Court of Appeals was not intended to suggest that only legal issues were involved in an evaluation of the contents of the Manual. The question is whether the Manual applies to, extends, or refines the cost principles of the Armed Services Procurement Regulations. If indeed the Manual plays any role in the application of these cost principles, it then contains "secret law" which is subject to disclosure under the FOIA. The issue here is quite similar to that presented in *Hawkes* v. *Internal Revenue Service,* 467 F.2d 787 (8th Cir. 1972), where the court held that public disclosure of the Internal Revenue Audit Man-

ual would be an aid in securing compliance with law rather than a hindrance. That reasoning is fully applicable here.

The issue here, then, is not whether appointment of a special master deprives the petitioners of their day in court. Rather, the issue is initially a factual one: Does the Manual have application to cost principles which control performance under a government contract and the allowability of costs associated therewith? To make this determination, the District Court sought the aid of a special master skilled in this field and holding the appointment of an Administrative Law Judge. It seems clear that the appointment of this special master can expedite development of a full record upon which the court can act.

It is difficult to understand the petitioners' reasoning in this case and the reasoning is certainly not disclosed in the Petition for a Writ of Certiorari. The petitioners will not by denial of certiorari be deprived of their right to a trial before the District Court. In fact, since the complex issues which occasionally arise in Freedom of Information Act cases entail the evaluation of specialized documents, district court judges should be given reasonable discretion to seek the assistance of properly qualified persons in recommending findings based upon expert analysis of documents involved.

In the instant case, we are not concerned with matters of national security, and review by Judge Arons will not result in further dissemination of the Manual. It is perplexing that while petitioners object to Judge Arons' review of the Manual, they at the same time have distributed it to the Italian Embassy, the Ger-

man Military Representative to the United States, the British Embassy, the Canadian Embassy, and to officials of state and local governments. Reference to a special master in this proceeding will not render Rule 53 moot. It will instead lead to a more complete record in the instant case and a more enlightened result.

CONCLUSION

For the reasons stated, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Washington, D.C. 20006
Attorneys for Respondent and Respondent-Intervenor

Of Counsel:

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Certificate of Service

I hereby certify that on this 10th day of April, 1975, three (3) printed copies of the Brief for Respondent and Respondent-Intervenor in Opposition to the Petition for Writ of Certiorari were served by hand on the following party as required by the Rules of the Supreme Court of the United States:

Solicitor General of the
United States
Department of Justice
Washington, D.C. 20530

/s/ ROBERT L. ACKERLY
Robert L. Ackerly

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1826-67

GILBERT A. CUNEO, ET AL., *Plaintiffs,*

v.

JAMES A. SCHLESINGER, ET AL., *Defendants.*

The Interrogatories heretofore served by Plaintiffs in the above captioned suit are responded to as follows:

Affidavit of Sybil L. Taylor

State of Virginia,
City of Alexandria, ss:

SYBIL L. TAYLOR, Being duly sworn deposes and says:

I have been the Records Administrator of the Defense Contract Audit Agency (DCAA) since July 1973; my duties include serving as Publications Control Officer for Headquarters, DCAA. The principal publication under my control is the Defense Contract Audit Manual.

In response to Interrogatory No. 1 which is set out immediately below:

> State the number of copies of the Defense Contract Audit Agency Manual (the Manual) that have been distributed to persons other than employees of the Defense Contract Audit Agency.

Department of Defense activities, other than the DCAA, were furnished 1,343 copies of the Manual; distributees

outside the Department of Defense were furnished 901 copies of the Manual; the total of copies thus distributed is 2,244.

In response to Interrogatory No. 2 which is set out immediately below:

> State the name and address of each person on the mailing list to receive copies of supplements to the Manual.

Attached hereto is a copy of the mailing list for copies of revisions to the Manual. Some addressees received more than one copy. It should be noted that this listing changes from time to time as addresses are added and others are deleted. All revisions are not mailed directly by DCAA. Addresses listed on pages 15 through 23 are forwarded in bulk to the Navy for distribution through Navy channels.

• • • • • • • • • • •

/s/ SYBIL L. TAYLOR
Sybil L. Taylor

(Subscription Omitted in Printing)

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APPENDIX B

12 February 1974

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Contract Appeals Division
Office of the General Counsel
Department of the Navy
Washington, D. C. 20360
Attention: Samuel Fishman, Esq.
Associate Counsel

Re: ASBCA No. 17130
Appeal of LTV Aerospace Corporation
Under Contract No. N00019-68-C-0571

ASBCA No. 17131
Appeal of Advanced Technology Center, Inc.
Under Contract No. N00017-69-C-1422

Gentlemen:

By letters dated 11 January 1974 (one on each appeal) appellant filed applications for Board orders ordering the Government to produce for inspection and copying certain papers that appellant had been denied during voluntary discovery conducted by the parties. The papers here concerned were described in the applications as follows: (Other papers concerned in the applications were produced for *in camera* inspection, inspected, and ruled on at the pre-hearing conference held on 29 and 31 January 1974.)

(1) DCAA audit manual

• • • • • • • • • • •

It is not clear to the Board whether the Government brought the entire DCAA audit manual to the conference.

The manual was reliably described as being in three volumes some eight to ten inches thick and, as described by Government counsel, the Board was persuaded that the entire manual would not be relevant or material to the issues involved in these appeals and that the production of the entire manual was not required. The Board's impression is that certain portions of the manual, the portions described by the Government as being in the nature of a "game plan" or "play book", may be privileged. The Board was not persuaded that the entire manual was privileged. The Board did not order that the entire manual be produced for its *in camera* inspection and the Board has not inspected the entire manual.

Government counsel did bring to the conference copies of certain pages of the manual containing information with respect to Leasing vs. Purchasing, Rental Costs (ASPR 15-205.34), and Leasing Costs. The issues in the two appeals concern such matters and, more specifically the meaning of ASPR 15-205.34.

The presiding Board Member (Administrative Judge Winter) requested that the Government present to him for his *in camera* inspection the pages of the manual as described above. The Government vigorously, but respectfully, declined to do so. The presiding Board Member then ordered that the pages be presented to him for his *in camera* inspection and this order was complied with. Time did not permit the inspection of the pages, and a ruling thereon, at the conference. Such an inspection has now been made and the Board's ruling will be made in and by way of this letter.

• • • • • • • • • • •

In ordering that the pages be produced for the *in camera* inspection of the Board the Board noted (1) that it was aware of no order or instruction by the Secretary of Defense (or, the Board now notes, parenthetically, by the

Secretary of the Navy, he being the Secretary of the department which awarded the contracts concerned) that the manual (or parts thereof) was not to be presented to, or ordered produced by, the Board for the Board's *in camera* inspection, and that therefore the Board, as the representative of the Secretary under its charter, in accordance with its Rules (which the Board notes have been approved by the Secretaries of the Departments concerned) would have to decide whether to order the production of the pages concerned and (2) that the request before the Board was not under the Freedom of Information Act but was instead under the Board's Rules and with respect to an appeal before the Board for decision, and that the fact that a document was, or was not, obtainable under the Act was not determinative as to whether it was, or was not, obtainable under Court and Board discovery rules.

The Board has now completed its *in camera* inspection of the pages of the DCAA audit manual produced for its inspection by the Government. By way of this letter it holds that they are subject to discovery by appellant and copies of such pages are sent to appellant as inclosures to this letter. The principal reason for the Board's ruling is that it considers the pages to contain relevant and material information with respect to a principal issue in the appeal, that issue being the meaning of the contract provision concerned. In so stating the Board notes that the pages concerned are not a part of the contracts concerned (either directly or by way of incorporation by reference) and therefore the Board does not presently consider that either party is bound by information on the pages. The Board's present understanding is that the DCAA audit manual is not a manual with which the contractors are obligated (by contract provision or otherwise) to comply. There is no present evidence before the Board showing that the contractors were aware of the contents of the pages or relied thereon prior to the time the disputes arose. The pages

do indicate, however, what some unidentified but presumable [*sic*] knowledgeable persons understand the contract provision concerned to mean and they could lead to the production of other relevant evidence.

• • • • • • • • • • •

• • • While the pages concerned clearly do contain advice by DCAA to its auditors as to DCAA's understanding as to what ASPR 15-205.34 means and as to matters to be considered in determining whether certain claimed costs are allowable thereunder, the Board does not consider that such advice is in the nature of privileged advice and recommendations concerning policy and legal matters. The pages do not contain advice and recommendations as to what policy should or should not be adopted or what legal position should or should not be taken, but instead purport to state the NCAA's understanding as to what the policy as it is expressed in ASPR 15-205.34 is and what the legal position so expressed is.

• • • • • • • • • • •

By order of the Board:

GEORGE L. HAWKES, Recorder
Armed Services Board of
Contract Appeals

Incls:
pages as follows from DCAA audit manual

1108 July 65
1109 July 65
1107 Aug 66 Rev 3
1108 Aug 66 Rev 3
1109 Feb 68 Rev 19
1107 Feb 71 Rev 50
1108 Sep 69 Rev 34
1109 Sep 69 Rev 34
1109.1 Sep 64(sic) Rev 34
Chap XI index I Feb 73 Rev 66
Chap XI index II June 73 Rev 67
1107 Aug 71 Rev 55
1108 Aug 71 Rev 55
1108.1 Aug 71 Rev 55
1109 May 72 Rev 60

APPENDIX C

GOVERNMENT PRIME CONTRACTS AND SUBCONTRACTS SERVICE

VOLUME III

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733 North Dodsworth Ave.
Covina, California 91724
Printed in the United States of America

DEFENSE CONTRACT AUDIT MANUAL

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APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No.

GILBERT A. CUNEO, ET AL., *Plaintiffs,*

v.

JAMES A. SCHLESINGER, ET AL., *Defendants.*

Affidavit of Sybil L. Taylor

State of Virginia,
City of Alexandria, ss:

SYBIL L. TAYLOR, Being duly sworn deposes and says:

1. Since July 1973 I have been the Records Administrator of the Defense Contract Audit Agency (DCAA); my duties include serving as Publications Control Officer for Headquarters, DCAA. The principal publication under my control is the Defense Contract Audit Manual. The control system for this publication utilizes an identification number which is placed on each copy issued. Although some copies were issued years ago without identification numbers, all copies, whether numbered or not, are controlled.

I have examined the unnumbered copy of the Defense Contract Audit Manual which Mr. Kleman, of the Office of Counsel, turned over to me on 21 October 1974. I have searched all records available but am unable to establish how the library of the Armed Services Board of Contract Appeals obtained this copy.

/s/ SYBIL L. TAYLOR
Sybil L. Taylor

(Subscription omitted in printing)

NOTICE OF CONTRACT COSTS ?ENDED AND/OR DISAPPROVED PAGE OF PAGES

(Name and address of contractor)	CONTRACT NUMBER	VOUCHER NUMBER
	NOTICE NUMBER	DATE OF NOTICE

1. This notice is issued pursuant to the authority of Paragraph VII B. of DoD Directive 5105.36, as implemented by Armed Services Procurement Regulation. It constitutes advice of costs suspended and/or disapproved incident to the audit of the above referenced voucher. Description of items and reasons for action are shown below.
2. SUSPENDED COSTS, as referred to herein, are costs which, for the reasons shown below, appear questionable but on which final determination has not been made.
3. DISAPPROVED COSTS, as referred to herein, are costs which, for the reasons shown below, have been determined by the undersigned to be unallowable.
4. As to any disapproved costs identified herein, this Notice constitutes a final decision of the Contracting Officer, effective sixty days after the date of its receipt by the Contractor, unless the Contractor mails or furnishes to the cognizant Administrative Contracting Officer a written appeal before the expiration of such sixty-day period. If this Notice becomes a final decision of the Contracting Officer by virtue of expiration of the sixty-day period, it may be appealed in accordance with the provisions of the "Disputes" clause of the contract identified above. If the Contractor decides to make such an appeal, written notice thereof (in triplicate) must be mailed or otherwise furnished to the Contracting Officer within thirty days from the date this decision becomes effective. Such notice should indicate that an appeal is intended and should reference this decision and identify the contract by number. The Armed Services Board of Contract Appeals is the authorized representative of the Secretary for hearing and determining such disputes. The rules of the Armed Services Board of Contract Appeals are set forth in the Armed Services Procurement Regulation, Appendix A, Part 2.

DCAA AUDITOR	DATE	ADDRESS	SIGNATURE

CONTRACTOR'S ACKNOWLEDGMENT OF RECEIPT - The contractor or his authorized representative shall acknowledge receipt of this notice to the DCAA auditor. One copy of the acknowledged notice will be submitted to the cognizant Administrative Contracting Officer.

DATE OF RECEIPT	TYPED NAME AND TITLE OF AUTHORIZED OFFICIAL	SIGNATURE

ITEM NO.	DESCRIPTION OF ITEMS AND REASONS FOR ACTION	AMOUNT OF COSTS	
		SUSPENDED	DISAPPROVED

DCAA FORM 7 SUPERSEDES CD FORM 336 EDITION OF 1 MAR 56

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1142

JAMES R. SCHLESINGER, SECRETARY OF DEFENSE, AND BERNARD B. LYNN, DIRECTOR OF DEFENSE CONTRACT AUDIT AGENCY, PETITIONERS

v.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR PETITIONERS

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1. The question presented by the petition for a writ of certiorari in this case is not whether the Defense Contract Audit Manual (the "Manual") is required to be disclosed under the Freedom of Information Act; rather it is whether the decision as to its status under the Act can be referred to a special master. As set forth in our petition (pp. 7-12), we submit that the policies of the Freedom of Information Act and Rule 53(b), Fed. R. Civ. P., preclude a reference of this question to a special master. See *La Buy* v. *Howes Leather Co.*, 352 U.S. 249.[1]

[1]The 1974 amendments to the Freedom of Information Act, cited by respondent (Brief in Opp. 7-8), confirm the use of *in camera* inspections by district courts in appropriate cases. The amendments do not refer to, much less authorize, the routine use of special masters.

2. Respondent emphasizes certain factual assertions, presumably for the purpose of suggesting that the Manual is not exempt from disclosure. As shown above, however, the status of the Manual is not presented in this petition. Moreover, respondent's factual assertions are misleading and in fact the Manual has not been disclosed to the public.

a. Although the Manual was cited by government counsel[2] to the Armed Services Board of Contract Appeals ("ASBCA" or "Board") in *LTV Aerospace Corp.* and *Advanced Technology Center, Inc.* (ASBCA Nos. 17130 and 17131), decided February 12, 1974, the Board did not order production of the entire Manual and has recognized that portions of the Manual may be privileged (Br. in Opp. 5a-8a).

b. A copy of the 1966 version of the Manual was placed in the Board's library without the authorization of the Defense Contract Audit Agency, and upon its discovery, was promptly withdrawn.[3]

c. One chapter of the Manual has been published by a private publisher without authorization of the Defense Contract Audit Agency. While, as a practical matter, publication moots the question of disclosure as to the material so published, it has no impact on unpublished portions of the Manual, nor on future revisions of the material so published.

d. Copies of the Manual have been distributed outside the Department of Defense only to other federal agencies and state and local governments, and to foreign govern-

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[2]As indicated in our petition (p. 10), in our view, the Manual should not be cited by counsel and is not a rule of decision in audit cases. See *The Boeing Company* (ABSCA No. 14370) 73-2 BCA par. 10,325, p. 48-753 (October 24, 1973).

[3]See the affidavit of Richard D. Kleman, Assistant Counsel of the Defense Contract Audit Agency, filed in the district court. (A copy of the affidavit has been lodged with the Clerk of this Court.)

ments that provide audit services for the United States. Copies of the Manual so distributed are stamped "For Official Use Only" and their delivery is accompanied by a letter explaining that the Manual is exempt from disclosure, and that recipients must take measures to ensure protection of its status.[4]

3. The reference of this case to a special master, and the district court's stated intention to follow this procedure in all complex Freedom of Information Act cases, is an example of the increasing tendency by district courts to refer entire categories of cases to United States Magistrates or special masters. The importance of this question is underscored by this Court's granting of certiorari in *Weinberger* v. *Weber*, No. 74-850, on March 24, 1975.

For the foregoing reasons, and for the reasons set forth in our petition, it is respectfully submitted that the petition for a writ of certiorari be granted.

ROBERT H. BORK,
Solicitor General.

APRIL 1975.

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[4]See the answers to interrogatories filed in the district court by Sybil L. Taylor, Records Administrator of the Defense Contract Audit Agency, a copy of which has been lodged with the Clerk of this Court.